

Distribution Agreements and Current Industry Trends for the Independent Distributor

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Issues

- Economic downturn
- Digital makeover
- New Media
- Increasing number of films
- Sales Agents
- Old Agreements

Essential Elements

- Minimum : title, cast, director, writer, running time, whether shot on 35mm or high definition
- Important when buy at script stage
- Bonding the film will make some of these difficult
- Right to terminate

Term

- The term

Necessity to offer lower MGs with consequence that Sales Agents will want to give shorter terms

- Solution: shorter term but automatic extension for up to 3 years if unrecouped at end of Initial term
- Also option to renew at end of term, complicated to renew once you have lost the title

Option to Extend

- On expiry of this Agreement, the Rights in the Film will first be offered to the Distributor who shall be entitled to re-acquire the Rights in the Film in the Territory on terms to be negotiated in good faith. If the parties fail to agree new terms within thirty (30) days of commencing negotiations, the Company shall be entitled to offer these rights to third parties but on the understanding that the Distributor shall have the right to match any offer made by any third party and if the Distributor does so within fourteen (14) days of receiving written notice from the Company of the full details of the third party offer, the Distributor and the Company shall enter into an agreement to reflect the terms of this acquisition.

Authorised Languages

- Original language version and original language version subtitled and/or dubbed in [**language of territory and all other official languages of the territory**] [and including parallel tracked/bilingual broadcast].
- **Where the original language is not the language of the territory usually can only release the original language on TV simulcast and have it on DVD's when menu and packaging is only in the language of the Territory**

Minimum Guarantee (1)

- Payment terms: Of course want to keep these as late as possible and sales agents want to be paid as early as possible
- Where you have a good payment relationship with sales agent easier to get better terms
- Where the film not yet made typically 10 to 15% on signature of long form agreement; 10 to 15% on start of principle photography; then remainder on delivery and acceptance of delivery materials
- Can also try to split up last payment and have a portion payable one month prior to release
- **[Note: if the film is still being financed, you may have to sign a Notice of Assignment for the banks/financiers]**

Minimum Guarantee (2)

- **1. The payment terms are on a film by film basis depending if it is on script or completed. i) We can set the time between payments using specific events such as initial photography, material delivery or theatrical release. ii) In our 'difficult' climate, it may even be easier to make one payment on or after theatrical release.**
- **2. Is an MG=0 and straight distribution deal possible? It is not a standard deal since MGs are needed to finance films etc., but can be considered when i) negotiating with own national producers; ii) films which are difficult to sell; iii) films which are small but you guarantee a small theatrical release; and iv) straight to Video/VOD deals.**

Rights

- Theatrical Rights, Non-Theatrical Rights, Public Video Rights, Commercial Video Rights, Hotel/Motel Rights, Airline and Ship Rights, Home Video Rights (including without limitation Covermount Rights), Electronic Sell Through/Download to Own Rights, Video On Demand /Download to Rent Rights, Near Video On Demand Rights, Pay Per View Rights, Pay Television Rights , Free Television Rights, Internet Rights, Wireless and Mobile Rights, Clip Rights.
- New Media Rights: **Sales agent may not want to give you an outright grant of the New Media Rights. If that is the case then have them granted to you but frozen until such time as they can be defined. There should be no extra MG. However, you will probably have to agree a royalty split (including how costs for these new rights will be paid) before you can exploit them.**

Holdback Periods against Distributor

- Undertaking in relation to certain categories of Rights not to permit the exploitation of the relevant Rights in the applicable medium during the relevant Holdback Period
- **Of course the distributor does not want any holdbacks and, at most, they should only be as “per industry standard” in the relevant territory. If you have to agree a holdback then there should be a specific end date for the holdback. Eg If there is a theatrical holdback until release in Licensor’s country then there should be a proviso: if they have not released [x] months after full payment of the MG then Distributor should be allowed to release.**

Holdbacks against Licensor

- No Airline Sale into and out of the Territory shall be possible before the theatrical release of the film in the Territory.
- **Where the Licensor has held back certain rights such as airline rights then there should be a holdback against the Licensor exploiting these rights in Distributor's territory. Eg, airline rights should be held back until about 2 months after theatrical release in Distributor's territory.**

Cutting and Editing

- interpolation or inclusion of advertisements, commercials, sponsorship billboards or anti-piracy warnings [**Note: This is not only for TV rights but also for VOD, PPV and EST rights.**]
- with respect to Television Rights, PPV Rights and Video On Demand Rights, for the purpose of meeting a broadcaster's or platform's "standards and practices" and any relevant codes of practice (including length and/or content requirements), time-compression to meet an appropriate broadcast slot, and 'panning-and-scanning' from letterbox format to full frame
- to meet censorship requirements of any officially recognised censorship authority in any part of the Territory to achieve an ["15"] certificate (or local equivalent) in such part of the Territory;
- to create a trailer or to comply with standards and practices (including length or content requirements) for airline exhibition; and
- to make sub-titled or dubbed versions of the Film in accordance with Clause 1.4 including without limitation for the hard of hearing.

Publicity Materials

- The Distributor shall have the right to create any additional materials for the purposes of advertising, publicising, marketing and promoting the Film.
- Get SA to agree to procure free and cleared access to all other versions and cuts of the Film and all marketing, advertising, promotional and publicity campaigns of the Film created by the SA or any third party for use by the Distributor
- **This is in the case of using another distributor's material or when outsourcing the design of publicity material. Sometimes the Licensor will only agree to use reasonable endeavours.**

Application of Gross Receipts

- **The Theatrical royalty split should be based on the need for the Distributor to earn the most from first incomes instead of waiting longer to make first earnings or risking no initial income from Theatrical receipts if the film does not recoup Theatrical Costs and MG.**

Theatrical Royalties

- **Always try to get a fee from first receipts with P&A costs coming recouped out of licensor's share then revert to a 50/50 split with MG recouped out of licensor's share**
- **If this is not possible then go for a fee from first receipts with P&A costs being recouped out of licensor's share and have 2 further tiers, (a better split out of which the MG is recouped and then a 50/50 split after recoupment The Distributor's fee tends to be 35% in this scenario, however we can ask for more if the split changes after recoupment as below. The MG should always be recouped from the Licensor's percentage.**
- **Costs off the top then 50/50 split**
- **Worse case scenario: Costs off the Top and MG recouped from 100% of receipts then a 50%-50%**

Video Receipts

- Normally based on wholesale price
- **Normally Distributor can not recoup Video costs and has 80% of receipts. No distinction should be made with 'covermount deals' in percentages. Distributor can ask for higher percentage, eg 90%, when retail price is lowered for 'budget deals', campaign or mail order.**
- **Sub-Distribution Deal: this is when a third company takes on the distribution costs and distributes under their label. The split with Licensor tends to be 50%-50% as Distributor has no costs**

Television Rights

- **These rights tend to be the most disadvantageous for the Distributor; the best is normally 50%-50%. Distributor should to get PPV separated out of television rights as you should be getting a higher rate for PPV similar to VOD and EST.**

VOD/EST/PPV

- Fee basis:
- A distribution fee to the distributor with remainder applied to recoupment of P&A expenses and the MG and thereafter 50/50 split
- OR
- Costs off basis:
- 100% of receipts to distributor until the Electronic Sell-Through/Download to Own, Download to Rent and Video on Demand Distribution Expenses have been recouped; thereafter 50% to the Distributor and 50% towards recoupment of P&A expenses and the MG and thereafter 50/50 split

VOD/EST/PPV

- **What are standard VOD percentages? It seems to be 50%, however should we consider incorporating marketing costs as costs off the top and having different percentages for New Releases and Catalogue titles since platforms differentiate between them.**
- **Flat deals (M.G. but no royalties) Usually for catalogue deals. One option is to do a flat deal for one right only, e.g. Flat TV or VOD. The M.G. is allocated among the rights eg 30% to Theatrical, 40% to TV, 30% to other rights and so only 60% of MG is recouped from Theatrical and other rights revenues. Supposedly a Licensor would only accept a part-flat deal if the MG is higher. In this case, the Distributor believes that the film will do well enough to generate high royalties and so they can make a saving on TV royalty payments**

VOD/EST/New Media

- Always get a wide grant of rights;
- VOD include specifically transactional, subscription, ad funded/sponsored and free video on demand (Near video on demand can be included under VOD or PPV)
- Exclusivity issues
- Old contracts that do not include VOD/EST and New Media: amendment letters, no additional MG, may not be crossed

Approvals

- **As much as possible avoid any rights of approval. If for example the Licensor wants a right of approval over P&A then at least get a cap pre-approved that you think will cover your theatrical release and have any further P&A approval not to be unreasonably withheld or delayed**
- **Approvals should always have a deemed approval provision**
- **Approvals are always the ones marketing and release arm of the company miss**

Delivery (1)

- Need a outside delivery date especially if the film has not yet been made; you can also add a date by which principle photography should have started
- Termination option if principle photography and/or delivery date exceeded

Delivery Materials

- DCPs with DKDMs
- Costs (new digital world was supposed to save everyone costs and allow greater freedom with filmmaking; reality very different especially in the conversion period)
- Access (open ended or limited)

New Versions

- Ownership of new versions and materials created by distributor (Licensor vs distributor; distributor during the term and then assigns to licensor at end of terms)
- Sometimes not possible due to laws of the territory
- Clearances (Especially important if distributor has farmed out the creation of the relevant materials)

Opportunities

- VOD regional/worldwide platforms
- Curzon on demand
- Pop up cinema
- Event cinema